UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Polo Development, Inc.,	)	
AIM Georgia, LLC, and	)	**Docket No. CWA-05-2013-0003**
Joseph Zdrilich	)	
	)	**Dated: August 6, 2014**
Respondents.	)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT

I. Procedural History

This proceeding was initiated by a Complaint filed by the United States Environmental Protection Agency ("EPA") Director of the Water Division, Region 5 ("Complainant"), pursuant to Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The Complaint charges Respondents with using mechanized clearing and earth-moving equipment to discharge dredge or fill material into waters of the United States, including wetlands, without a permit required by Section 404 of the CWA. The Complaint states that EPA issued an administrative order requiring Respondents to develop and implement a plan to restore the filled area to wetlands, and Respondents submitted a wetlands restoration plan, but after EPA approved it, Respondent Zdrilich informed EPA that he would not conduct restoration work in accordance with the plan and would not restore certain areas. The Complaint proposes that Respondents be assessed a civil penalty in the amount of $30,500 for discharging pollutants into navigable waters in violation of Sections 301 and 404 of the CWA. Respondents, through counsel, each filed an Answer to the Complaint, denying the alleged violations and asserting affirmative defenses.

By Prehearing Order dated March 22, 2013, the parties were directed to file prehearing exchange information. Complainant timely filed a prehearing exchange. Respondents were required to file prehearing exchange(s) on or before June 7, 2013, but pursuant to the parties' joint requests for extensions of time, Respondents' deadline to file a prehearing exchange was extended twice. Respondents' counsel moved on October 21, 2013 to withdraw as their legal representative, and the motion was granted by order extending the due date yet again, to December 6, 2013.

When Respondents failed to file a prehearing exchange by that date, an Order to Show Cause was issued on January 27, 2014, requiring Respondents to explain by February 14, 2014 why they failed to submit a prehearing exchange by the required deadline and warning

Respondents that a default order and a full penalty could be issued against them if they do not comply with the prehearing exchange requirements. On or about February 13, 2014, Respondents submitted a request for an extension of 60 days to file a prehearing exchange, stating that Respondents anticipate completing a wetlands restoration report and resolving "all outstanding wetlands restoration issues" within 60 days. Complainant opposed the request on several grounds, but expressed agreement to a 30-day extension provided the Respondents completed all "outstanding restoration work" and "non-restoration" work within that time, including payment of a penalty and costs within the terms of a Consent Order that the parties had previously negotiated to resolve this proceeding. Complainant's Response in Opposition to Respondents' Motion to Extend Time, dated February 19, 2014, at 3. By Order dated February 21, 2014, Respondents were granted 30 more days to file a prehearing exchange, extending the deadline to March 14, 2014, and were directed to explain their failure to submit a prehearing exchange by the previous deadline of December 6, 2013 and why a default decision should not be entered against them.

On March 14, 2014, Respondents' Initial Prehearing Exchange ("Respondents' Prehearing Exchange" or "R's PHE") was received by email to the undersigned's staff attorney. The attached Certificate of Service shows that it was sent on March 13, 2014 by Federal Express to Complainant's counsel and to the former address of the Headquarters Hearing Clerk and undersigned.

On March 24, 2014, Complainant submitted a Motion for Default Order ("Motion" or "Mot."), with several attached exhibits. The Motion requests that Respondents be found in default and assessed the proposed penalty of $30,500, on the basis that they failed to comply with the prehearing orders and that there is a strong probability that litigating their prehearing defenses will not produce a favorable outcome.

To date, no response to the Motion has been filed. However, a paper copy of Respondents' Prehearing Exchange was received by the Office of Administrative Law Judges on April 9, 2014, with a Certificate of Service indicating it was sent to Complainant's counsel and to the undersigned's current address via Federal Express on April 7, 2014.

II. Legal Standards

The procedural rules governing this proceeding are codified at 40 C.F.R. Part 22 ("Rules of Practice" or "Rules"). Section 22.17 of the Rules provides in pertinent part:

> (a) *Default*. A party may be found to be in default: . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. * * * *
>
> (c) *Default order*. When the Presiding Officer finds that default has occurred, [she] shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order

> resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. * * * *

40 C.F.R. § 22.17. The word "may" in the introductory clause of 40 C.F.R. §22.17(a) indicates that a finding of default is a matter of discretion.

Generally, default is a harsh and disfavored sanction and is "appropriate where the party against whom the judgment is sought has engaged in 'willful violations of court rules, contumacious conduct, or intentional delays'" but is "not an appropriate sanction for a 'marginal failure to comply with time requirements.'" *Forsythe v. Hales*, 255 F.3d 487, 490 (8th Cir. 2001) (*quoting Ackra Direct Mktg. Corp.* v. *Fingerhut Corp*., 86 F.3d 852, 856 (8th Cir. 1996)).

The Environmental Appeals Board ("Board" or "EAB") has "endorsed the general principle of law disfavoring default as a means of concluding cases." *JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005). It has noted that "doubts are generally resolved in favor of the defaulting party." *Thermal Reduction Co., Inc*., 4 E.A.D. 128, 131 (EAB 1992). "[W]here a respondent fails to adhere to a procedural requirement, the Board has traditionally applied a 'totality of the circumstances' test to determine whether a default order should be or has properly been entered," considering "whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there is a valid excuse or justification for not complying with the procedural requirement." *JHNY*, 12 E.A.D. at 384.

Mere lack of willful intent to delay proceedings does not excuse noncompliance with the Rules. *Jiffy Builders, Inc.*, 8 E.A.D. 315, 321 (EAB 1999). The fact that a respondent chooses to represent himself "does not excuse respondent from the responsibility of complying with applicable rules of procedure." *Rybond*, 6 E.A.D. 614, 627 (EAB 1996)(quoting *House Analysis & Assoc. & Fred Powell*, 4 E.A.D. 510, 505 (EAB 1993). Nevertheless, *pro se* litigants are generally afforded a greater degree of liberality. *Carter v. Hutto*, 781 F.2d 1028, 1031 (4th Cir. 1986) (liberality applied to the requirements of a pretrial order). "[B]oth federal courts and the Agency have adopted a more lenient standard of competence and compliance when evaluating the submissions of a *pro se* litigant." *Four Star Feed and Chemical*, Docket No. FIFRA 06-2003-0318, 2004 EPA ALJ LEXIS 130, *12-13 (ALJ, July 21, 2004), *citing Rybond, Inc*., 6 E.A.D. 614, 627 (EAB 1996).

In regard to the importance of the prehearing exchange requirements and default for failure to comply with them, the Board has explained:

> [B]ecause federal administrative litigation developed as a truncated alternative to Article III courts that intends expedition . . . , the prehearing exchange plays a pivotal function - ensuring identification and exchange of all evidence to be used at hearing. . . [, it] clarifies the issues to be addressed at hearing and allows the parties and the court an opportunity for informed preparation for hearing . . . [and thus] it is not surprising that the regulations recognize that failure to comply with

> an ALJ's order requiring exchange is one of the primary justifications for entry of default.

JHNY, Inc., 12 E.A.D. at 382.

Default may be appropriate where a prehearing exchange is both untimely and substantially incomplete. For example, the Board upheld default judgment against a respondent who filed a prehearing exchange which described proposed testimony and identified specific financial documents previously provided to opposing counsel, but which was not filed until after an Order to Show Cause was issued, and did not include any proposed exhibits or any explanation of why the penalty should be reduced. *JHNY,* 12 E.A.D. at 385-390. The Board also upheld default judgment against a respondent who elected to proceed without counsel, for an untimely and insufficient one-page prehearing exchange. *Rybond,* 6.E.A.D. 614.

In examining the totality of circumstances, the Board has taken into consideration the respondent's likelihood of success on the merits, stating that it is permissible to find good cause not to enter a default order where the respondent shows a strong probability that litigating the defense will produce a favorable outcome. *Pyramid Chemical Company* 11 E.A.D. 657, 662, 669 (EAB 2004)(upon consideration of motion for default and respondent's response to order to show cause, default judgment granted for respondent's failure to file answer to complaint); *Jiffy Builders,* 8 E.A.D. at 322; *Rybond,* 6 E.A.D. at 628.

III. Complainant's Arguments

Complainant request judgment by default against Respondents on grounds that they have failed to comply with three of this Tribunal's orders without valid excuse or justification, and have failed to demonstrate that there is a strong probability that litigating their defenses will produce a favorable outcome.

Complainant asserts that Respondents have failed to file a prehearing exchange by the December 6, 2013 deadline, despite having ample advance notice of the prehearing exchange requirement, as the deadline was previously extended three times. Respondents also have failed to respond to the Order to Show Cause in that they have explained neither the reason for the delay nor a reason why default judgment should not be issued. Mot. at 13-14.

Further, Complainant argues that Respondents' prehearing exchange does not comply with the Prehearing Order requirements to provide a detailed narrative explanation for the basis of their defenses and affirmative defenses, explain why the penalty should be reduced and provide documentation supporting their inability to pay argument. Complainant is thereby deprived of the opportunity to prepare for hearing. *Id*. at 15.

Next, Complainant asserts that the corporate Respondents Polo Development, Inc. and AIM Georgia, LLC have not filed a prehearing exchange because the documentary record shows that Joseph Zdrilich has not been identified as the legal representative for those entities. *Id*. at 16. Complainant points to its Prehearing Exchange Exhibits 30 and 49 indicating that his wife, Mrs. Donna Zdrilich, is the companies' representative, because she is AIM Georgia's owner and

managing member and Polo Development's president. Three separate Answers to the Complaint were filed, which did not identify Mr. Zdrilich as a legal representative. Furthermore, according to a Declaration of Melanie Burdick, an EPA enforcement officer, Mr. Joseph Zdrilich had stated on a voice mail message on February 25, 2014 as follows:

> I would like to split the case from my wife from Polo Development and AIM Georgia because I have nothing to do with it anymore, and I would like to represent myself as Joseph Zdrilich, that I am separate from them, and I would like to go as far as I can go through courts …

Id., citing Declaration of Melanie Burdick ("Burdick Decl.") ¶ 4. Complainant states that, given this record, "it is reasonable to conclude that Joseph Zdrilich has not been given legal authority to sign documents for Polo Development, Inc. and AIM Georgia, LLC." Mot. at 16.

Further, Complainant alleges that Respondents misled this Tribunal, as the motion filed in February requested additional time to settle the case, when Mr. Zdrilich had no intention to engage in settlement, as evidenced by the Prehearing Exchange which does "not identify what they have done to advance settlement since February 21, 2014," and by the February 25, 2014 voice mail message of Joseph Zdrilich, in which he stated that he does not want to settle the case. Mot. at 17, citing Burdick Decl. ¶ 4.

Finally, Complainant argues that the Respondents' Prehearing Exchange waives the defenses raised in the Answers and does not provide evidence of a defense to the alleged violations. Mot. at 17-25. Complainant asserts that Respondents do not address evidence that they placed fill material in waters as alleged in the Complaint, and that the Respondents' arguments and documents provided in their Prehearing Exchange "are either legally irrelevant or factually unsupportable" and thus do not demonstrate a "strong probability that proceeding to hearing would produce a favorable outcome for Respondents." Mot. at 18.

IV. Discussion & Conclusion

Respondents' failure to file a prehearing exchange by December 6, 2013 does not warrant a finding of default in the circumstances of this case, given the withdrawal of the Respondents' representative, and their timely request for an extension of time that was at least to some degree responsive to the Order to Show Cause. Respondents had been involved in negotiations with Complainant to settle this case, including a plan for restoring wetlands on the site. A reasonable extension of time was granted to support the possibility of a settlement of this matter and yet proceed toward a hearing in the event that the parties are unable to reach a settlement. While the Respondents' request for extension did not explain their failure to file a prehearing exchange, it may be inferred that their intent to settle this case immanently would obviate the need for the prehearing exchange.

Moreover, Mr. Zdrilich submitted electronically a Prehearing Exchange that arrived in the office of the undersigned by the March 14 due date set by the order dated February 21, 2014. The fact that the paper copy did not reach the Hearing Clerk for filing by the March 14 due date

will not be attributed to any fault of Respondents, as the certificate of service on the electronic copy shows that it was sent timely by Federal Express to the previous address of the Hearing Clerk and the undersigned, and there is no indication in the case file that notice was provided to Respondents of the change of address. Complainant acknowledges receipt of Respondents' prehearing exchange on March 14, 2014. Mot. at 12. But for Respondents' apparently innocent mistake regarding the filing address, Respondents' prehearing exchange would have been timely filed, and upon notice of the change of address, it was filed with the Headquarters Hearing Clerk on April 9, 2014.

The Respondents' lack of explanation why they failed to file a prehearing exchange by December 6, and the inconsistency between the request for extension based on intention to settle and Mr. Zdrilich's communication of an intention not to settle could suggest some doubt as to Mr. Zdrilich's integrity. However, there is no substantial basis for finding bad faith or deliberate efforts to delay the proceedings, particularly where factors involved with settlement could have changed in the days between the request for extension of time and the voice mail message. These factors are not a subject of inquiry here, as they are relevant to settlement negotiation and not to the litigation of this case.

As to the sufficiency of Respondents' Prehearing Exchange, it includes copies of eight proposed exhibits and summaries of testimony of several proposed witnesses. The exhibits include correspondences involving the proposed witnesses, evidence concerning size estimates of the subject wetland, elevation studies of the site, and the Wetland and Stream Impact photo also submitted by Complainant. Although Respondents' Prehearing Exchange does not provide particularly detailed narrative arguments, it does assert that "liability for the violation allege[d] in this matter cannot be demonstrated" and that Respondents' behavior was not willful or negligent. R's PHE at 1-2. The Prehearing Exchange states that Respondents' development activities were previously permitted under a Nationwide Permit issued by the U.S. Army Corps of Engineers and were within parameters set forth in communications from EPA and the Corps of Engineers, and that the requirements imposed by EPA evolved so that strict compliance was not feasible.

The content of Respondents' Prehearing Exchange satisfies the basic prehearing exchange requirements of the Rules of Practice, 40 C.F.R. § 22.19(a)(2) by including the names and summaries of testimony of proposed witnesses, and copies of proposed exhibits, and briefly explaining why the proposed penalty should be reduced or eliminated. This provides Complainant with sufficient information to prepare for a hearing, which has not yet been scheduled in this case.

Respondents' Prehearing Exchange does not refer to or include documentation regarding the assertion in the Answers of inability to pay the penalty. Nor does it address a variety of other defenses alleged in the Answers, although they were directed in the Prehearing Order to provide a detailed narrative explanation for the bases of their defenses. This suggests that Respondents are abandoning those arguments. To the extent that Complainant is concerned that it would be prejudiced if Respondents introduce testimony or evidence at the hearing in support of these arguments and defenses, under 40 C.F.R. §22.19(a), such evidence will not be admitted into evidence unless the strictures of §22.22(a) are satisfied.

Considering the totality of the circumstances as described by the Board, the timing and manner of submitting Respondents' Prehearing Exchange and the lack of direct explanation for missing the due date are not proper grounds for a default order in the circumstances of this case. Because Respondents are not found to be in default on procedural grounds, the Respondents' likelihood of success on the merits of their case need not be addressed at this juncture.[1]

The next question is whether to hold the corporate Respondents in default on the basis that the Prehearing Exchange was submitted only on behalf of Mr. Zdrilich and not on their behalf. It is entitled "Respondents' Initial Prehearing Exchange," refers to plural "Respondents," and shows a signature of Mr. Zdrilich with the words "with express permission" over the names of each of the Respondents. The Rules provide that "[a]ny party may appear in person or by counsel or other representative" and "[a] partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation." 40 C.F.R. § 22.10. For purposes of ruling on the Motion for Default, Mr. Zdrilich's representation that he filed the Prehearing Exchange on behalf of all Respondents will be taken at face value, particularly where it is undisputed that Donna Zdrilich is the wife of Mr. Zdrilich, and the email enclosing Respondents' Prehearing Exchange was sent from an email address marked "DONNA ZDRILICH," suggesting that the person who Complainant believes is the corporate Respondents' representative in fact submitted the Prehearing Exchange. Furthermore, Complainant's Prehearing Exchange notes that official records of the Georgia Secretary of State list Mr. Zdrilich as a member of AIM Georgia, LLC. C's PHE Table 5. Documents, including certificates of service, in the case file indicate that the mailing address of Polo Development, Inc. is the same as that of Respondent Mr. Zdrilich and Donna Zdrilich. The Answers of the three Respondents do not indicate inconsistent defenses that would suggest a need for prehearing exchanges to be filed separately for each Respondent. Therefore, Respondents Polo Development, Inc. and AIM Georgia, LLC are not found to be in default for failure to file a prehearing exchange.

Notwithstanding the denial of the motion for default in this instance, **Respondents are hereby warned that failure to strictly follow all requirements set forth in the Rules of Practice and the Orders issued by this Tribunal is unlikely to be tolerated in the future.**

For the foregoing reasons, Complainant's Motion for Default is **DENIED**.

SO ORDERED.

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M. Lisa Buschmann
Administrative Law Judge

[1] To the extent that Complainant takes the position that there are no genuine issues of fact material to Respondents' liability, a motion for accelerated decision is an appropriate method for obtaining judgment in Complainant's favor on liability.